

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THE ESTATE OF ANGEL LOPEZ by
and through its successor in interest,
LYDIA LOPEZ; LYDIA LOPEZ;
ANGEL LOPEZ, JR. and HECTOR
LOPEZ, by and through their guardian
ad litem, LYDIA LOPEZ.

—

Plaintiffs,

CITY OF SAN DIEGO;
KRISTOPHER MICHAEL WALB
AND DOES 2-30,

Defendants.

CASE NO. 13cv2240-GPC-MDD

**ORDER GRANTING IN PART AND
DENYING IN PART
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

[Dkt. No. 48.]

1. INTRODUCTION

Presently before the Court is a Motion for Summary Judgment filed by Defendants City of San Diego and Kristopher Walb (“Defendants”). (Dkt. No. 48.) The Parties have fully briefed the motion. (Dkt. Nos. 50, 52.) Pursuant to Civil Local Rule 7.1(d)(1), the Court finds the matter suitable for adjudication without oral argument. For the following reasons, the Court **GRANTS IN PART AND DENIES IN PART** Defendants’ Motion for Summary Judgment.

II. FACTUAL BACKGROUND

This case arises from the shooting death of Angel Lopez (“Lopez”) by San Diego Police Officer Kristopher Walb on January 17, 2013. Except where noted, the

1 following factual background is undisputed.¹

2 At the time of the subject incident, Lopez was on parole after serving a sentence
 3 for felon in possession of a firearm. (Dkt. No. 48-3, Torres-Skerett Decl. ¶¶ 5-6.)
 4 Following violations of his parole, a warrant was issued for Lopez's arrest and listed
 5 Lopez as armed and dangerous. (*Id.* ¶¶ 7-8, 15.)

6 On the morning of January 17, 2013, Parole Agent Lou Torres ("Agent Torres"),
 7 who was Lopez's case agent, received a call from a person named Alec who inquired
 8 if Agent Torres was the parole agent for Angel Lopez aka Necio. (*Id.* ¶¶ 10, 16.) The
 9 caller stated that Lopez and his father, Alex Lopez, were at 5444 Reservoir Drive,
 10 Apartment #58. (*Id.* ¶ 17.) The caller was aware that the father was also a parolee at
 11 large, was a member of the "Sherman" gang, and went by the name Conejo (Rabbit).
 12 (*Id.*) Agent Torres was able to confirm the information with respect to the father. (*Id.*
 13 ¶ 18.) In addition, the caller stated that Angel Lopez was left handed and would be
 14 carrying a .25 caliber pistol in his left pocket. (*Id.* ¶ 19.) The caller indicated that the
 15 father had a sawed-off shotgun and an AK-47 at Apartment #58. (*Id.* ¶ 20.) The caller
 16 identified two vehicles to look for, one a rented Ford Focus and the other a 1999 Ford
 17 Explorer, license number 4HCL80, a known vehicle driven by Angel Lopez's wife,
 18 Lydia Lopez. (*Id.* ¶ 21.) Agent Torres and the caller Alec then exchanged phone
 19 numbers. (*Id.* ¶ 22.)

20 Agent Torres met with Captain Andrew Mills ("Captain Mills") of the Eastern
 21 Division San Diego Police Department ("SDPD") and passed on the information given
 22 to him by the caller Alec. (*Id.* ¶ 23.) Based on that information, Captain Mills directed
 23 various SDPD personnel to confirm the caller's information and collect background on
 24 Angel Lopez.

25 One of the assigned officers was Sgt. Steve Riddle ("Sgt. Riddle"), who was a
 26 gang detective who specialized in Hispanic gangs. (Dkt. No. 48-4, Riddle Decl. ¶ 3.)

27
 28 ¹To the extent that the Court relied upon evidence to which the parties objected,
 the objections are overruled. To the extent the Court did not rely on evidence to which
 the parties objected, the objections are overruled as moot.

1 Angel Lopez was a member of one of the targeted gangs, Sidro, and therefore Sgt.
 2 Riddle was familiar with Lopez and his past gang activities. (*Id.* ¶¶ 4-9.) Sgt. Riddle
 3 met with Captain Mills, Agent Torres, and others, and provided information about
 4 Lopez, his father, and the Sidro gang. (*Id.* ¶¶ 10-30.) For example, Sgt. Riddle
 5 informed them that Lopez had a history of gun violence, must be considered to be
 6 armed, was unpredictable, and had a number of gang tattoos, including on his neck.
 7 (*Id.* ¶¶ 14, 20, 22, 24.)

8 Two undercover officers, acting Detective Paul Tom and Detective Brad Elow
 9 (“Detective Elow”), were sent to 5444 Reservoir Drive and located in the parking lot
 10 a burgundy four-door hatchback Ford Focus, license number 5UNK285 CA. (Dkt. No.
 11 48-5, Elow Decl. ¶ 7.) A patrol officer, at Detective Elow’s direction, ran the plate and
 12 determined that it was registered to a rental car company. (*Id.* ¶ 9.)

13 At approximately 10:33 a.m., January 17, 2013, Detective Tim Williams
 14 contacted the rental car company. (Dkt. No. 48-6, Williams Decl. ¶ 6.) The rental
 15 agreement indicated that the burgundy Ford Focus was rented on January 10, 2013, to
 16 Xavier Lenyoun. (*Id.* ¶ 7.) Xavier Lenyoun also rented Apartment #58 at 5444
 17 Reservoir Drive. (*Id.* ¶ 8.)

18 Detective Dean Way obtained a photo of Angel Lopez, and confirmed its
 19 authenticity with Agent Torres. (Dkt. No. 48-7, Way Decl. ¶ 5.) The photo was then
 20 distributed to members of the SDPD involved in the operation. (*Id.* ¶ 6.)

21 A Special Response Team (“SRT”) unit, and two Primary Response Team
 22 (“PRT”) units, undercover officers and uniformed officers were deployed to the
 23 Reservoir Drive area. (Dkt. No. 48-9, Ramsay Decl. ¶¶ 3-4.) SRT Sgt. Mike Ramsay
 24 informed the SRT Unit, which included Officers Kristopher Walb (“Officer Walb”),
 25 Brad Pickett (“Officer Pickett”), and Jason Scott (“Officer Scott”), “all the information
 26 he had been provided, which included background from Eastern Division, as well as
 27 radio transmissions.” (*Id.* ¶ 5.)

28 SRT was deployed in an unmarked van on the eastside parking lot of the target

1 apartment on Reservoir Drive. (*Id.* ¶ 6.) The PRT officers were in marked SDPD
 2 vehicles deployed in the immediate area. (*Id.* ¶ 7.) The initial plan called for PRT
 3 officers to conduct a vehicle hot stop of Angel Lopez and his father if they were in a
 4 vehicle. (*Id.* ¶ 8.) SRT was to deploy to the target apartment, 5444 Reservoir Drive,
 5 #D58, lock the exterior of the apartment down and conduct containment and call out
 6 if there were subjects in the apartment. (*Id.* ¶ 9.) Undercover officers were acting as
 7 the “eyes,” attempting to spot the suspect. (*Id.* ¶ 10.)

8 Uniformed Officers Nicholas Ketchum (“Officer Ketchum”) and Christopher
 9 Luth (“Officer Luth”) received information via radio that two Hispanic males walked
 10 out of the apartment complex towards the burgundy Ford Focus. (Dkt. No. 48-10, Luth
 11 Decl. ¶¶ 3, 8.) The officers drove over to the Ford in a marked vehicle. (*Id.* ¶ 8.)
 12 Officers Ketchum and Luth exited the vehicle with their weapons aimed at the suspects
 13 and ordered them to the ground. (*Id.* ¶ 9.) Officer Luth shouted “Stop! Get on the
 14 ground!” several times. (*Id.*) Both suspects turned around and ran back toward the
 15 apartment complex. (*Id.*)

16 The SRT officers responded to a radio report that the suspects had fled on foot.
 17 (Dkt. No. 48-11, Walb Decl. ¶ 14.) Officers Walb, Pickett, and Scott entered the
 18 apartment complex through the west entrance with the thought of reaching Apartment
 19 #58 on the third floor. (*Id.* ¶ 15.) As Officer Walb approached the third floor landing,
 20 he could hear someone running in the third floor hallway. (*Id.* ¶ 16.) Officer Walb
 21 waited a few seconds anticipating the person to come through the door at the stairwell.
 22 (*Id.* ¶ 17.) Within seconds, the door flew open as a Hispanic male matching Lopez’s
 23 description opened the door. (*Id.* ¶ 18.) The individual appeared to match the weight,
 24 height, and age of Lopez, and the tattoos on his neck were consistent with what Officer
 25 Walb had seen on the photo of Lopez. (*Id.* ¶ 19; Dkt. 50-11, Walb Dep. 128:8-22.²)
 26 Officer Walb issued commands in a loud, clear voice: “Police,” “Don’t move.” (Walb
 27

28 ²Deposition page number citations such as this one are to the page numbers
 reflected on the reporter’s transcript and not to the page numbers assigned by the
 Court’s CM/ECF system.

1 Decl. ¶ 21.)

2 Lopez spun around and ran back down the hallway. (*Id.* ¶ 22.) Officer Walb
 3 opened the door, turned to the right, and continued forward in the hallway. (Walb Dep.
 4 129:7-9.) There was no ambient light or windows, so Officer Walb turned on the
 5 flashlight on his MP-5 weapon, which clearly illuminated the scene. (Walb Dep.
 6 27:22-28:8; Walb Decl. ¶ 25.) All three officers moved down the hallway in a diagonal
 7 echelon formation with their MP-5 machine guns pointed at Lopez. (Walb Decl. ¶ 26.)

8 The parties dispute Lopez's next movements before Officer Walb shot him.
 9 According to Officer Walb, he shouted several times at Lopez at the top of his lungs
 10 "get down" and "take your hands out of your pockets." (Walb Dep. 28:9-29:16,
 11 129:24-130:2, 138:5-22; Walb Decl. ¶ 27.) Officer Walb never saw Lopez's left hand
 12 come out of his pocket. (Walb Dep. 29:17-22, 130:8-22, 148:16-25.) Lopez proceeded
 13 down the hall until he reached Apartment #58 and turned away from Officer Walb, but
 14 Lopez could not get in the door. (Walb Dep. 130:23-131:3; Walb Decl. ¶¶ 28-30.)
 15 Officer Scott shouted "left hand, left hand." (Walb Decl. ¶ 32; Walb Dep. 135:11-13.)
 16 Officer Walb told Lopez to put his hands up. (Walb Dep. 131:6-7.) Lopez's left hand
 17 remained in his pocket, and Lopez raised his right hand up, but not completely and still
 18 guarded it towards his body. (Walb Dep. 131:8-12; Walb Decl. ¶¶ 35-37.) Lopez
 19 started slowly kneeling down as Officer Walb was coming toward him. (Walb Dep.
 20 131:18-22; Walb Decl. ¶ 37.) However, Lopez was not going to the ground as ordered.
 21 (Walb Decl. ¶ 37.) Lopez suddenly turned his body and head slightly to the right. (*Id.*
 22 ¶ 39.)

23 According to Officer Pickett, he entered the third floor hallway after Officer
 24 Walb, and Officer Scott was behind him. (Dkt. No. 50-12, Pickett Dep. 9:13-10:5.)
 25 Officer Pickett said "Police. Stop." two or three times in a loud and commanding voice,
 26 and also heard Officer Walb tell Lopez "Police. Stop." (Pickett Dep. 14:5-15:21; Dkt.
 27 No. 48-12, Pickett Decl. ¶¶ 27-28, 30-31.) Officer Pickett saw Lopez's left hand in his
 28 left front shorts pocket as Lopez was just beginning to step away from the door of

1 Apartment #58. (Pickett Dep. 18:2-7.) He also saw Lopez make an exaggerated move
 2 with his left hand into his left front shorts pocket. (Pickett Dep. 25:10-16; Pickett Decl.
 3 ¶¶ 33-36.) Officer Scott was shouting “Left hand! Left hand!” (Pickett Decl. ¶ 37.)
 4 Lopez began turning towards the officers, to the right. (Pickett Dep. 30:12-18; Pickett
 5 Decl. ¶ 38.)

6 According to Officer Scott, in the third floor hallway, he was behind Officer
 7 Pickett, who was behind Officer Walb. (Dkt. No. 48-13, Scott Decl. ¶¶ 21-22.) Officer
 8 Scott saw Lopez step out of the alcove of Apartment #58, and begin moving away from
 9 the officers. (Dkt. No. 50-13, Scott Dep. 36:12-23; Scott Decl. ¶ 24.) Officer Scott
 10 shouted, “Don’t move! Get down! Get down!” and he also heard Officer Walb say
 11 “Get down.” (Scott Dep. 37:24-38:7; Scott Decl. ¶ 25.) Officer Scott saw Lopez’s
 12 hand, which had nothing in it, go into his pocket or the front of his waistband. (Scott
 13 Dep. 46:20-25; Scott Decl. ¶ 26.) Officer Scott yelled “Left hand! Left hand! Watch
 14 his left hand!” (Scott Decl. ¶ 29.) Lopez had his right side facing Officer Scott, but
 15 Officer Scott could not give an exact angle. (Scott Dep. 35:12-24.)

16 Officer Walb then shot Lopez, from a distance of 15 to 20 feet, at 12:59 p.m. on
 17 the afternoon of January 17, 2013. (Walb Dep. 6:18-7:8, 131:23-132:2.) Officer Walb
 18 fired two, three-round bursts from his MP-5 weapon. (Walb Dep. 7:9-8:13; Walb Decl.
 19 ¶ 43.) The second burst was directly after the first. (Walb Dep. 8-13.) According to
 20 all three officers, Lopez was standing when Officer Walb shot him. (Walb Dep. 11:19-
 21 12:21; Pickett Dep. 29:9-31:3; Scott Dep. 38:11-21.) Officer Walb stated that Lopez
 22 was turning towards him, so that the right side of Lopez’s body was facing him, when
 23 he fired his weapon. (Walb Dep. 10:10-11:1.) At the time he shot Lopez, the angle of
 24 Officer Walb’s weapon was parallel or just slightly lower than parallel to the ground.
 25 (*Id.* 132:6-14.) Three of the six bullets hit Lopez: one to the back of the head, one to
 26 the lower right back, and one to the right side of the upper-mid back. (Dkt. 50-10 at
 27
 28

1 2-3.³) After he was shot, Lopez immediately fell forward and was pronounced dead at
 2 the scene. (Walb. Decl. ¶ 44.)

3 The parties' ballistics experts agree that, based on the gun shot wound paths,
 4 Lopez could not have been either standing or fully prone when the shots impacted
 5 Lopez. (Dkt. No. 50-14, Martini Dep. 76:1-22; Dkt. No. 50-17, Martini Report at 38;
 6 Dkt. No. 52-5, Haag Decl. ¶¶ 8, 19.) Rather, Lopez was in a forward descending
 7 motion at the time the bullets struck him. (Dkt. No. 50-15, Martini Dep. 136:22-137:1;
 8 Dkt. No. 50-17 at 38; Haag Decl. ¶ 18(f).) Plaintiffs' ballistic expert concluded that
 9 when he was shot Lopez was either transitioning from a standing to a kneeling
 10 position, in a kneeling position, or transitioning from a kneeling position into a prone
 11 position. (Dkt. No. 50-17 at 38-39.)

12 Plaintiffs' ballistics expert also concluded that the wound paths are inconsistent
 13 with Lopez turning to his right when he was shot by Officer Walb. (Dkt. No. 50-17 at
 14 40.) However, Defendants' ballistics expert concluded that the wound paths are not
 15 inconsistent with Lopez turning to his right when Officer Walb decided to fire because
 16 Lopez could have changed positions immediately before and while being struck. (Dkt.
 17 No. 52-8, Kapelsohn Decl. ¶¶ 5-7.)

18 After the shooting, officers searched Lopez's body. (Luth Decl. ¶¶ 12, 15.)
 19 Lopez's left hand was concealed underneath his chest area on the left side. (Dkt. No.
 20 50-19, DeWitt Report at 3). Officers did not find a gun on Lopez. (Luth Decl. ¶¶ 12,
 21 15; Walb Dep. 138:23-25.) However, officers did find on Lopez one syringe loaded
 22 with a dark brown liquid, one blue balloon wrapped in a napkin, three "bindles," and
 23 another "bindle" held in a metal container. (Luth Decl. ¶ 15.) The blue balloon and
 24 "bindles" all contained apparent narcotics. (*Id.* ¶¶ 16-17.) The autopsy toxicology
 25 report revealed the testing of peripheral blood detected methamphetamine (1.1 mg/L),
 26 amphetamine (0.07 mg/L), trace ephedrine and morphine (0.23 mg/L). (Dkt. No. 48-
 27

28 ³Page number citations such as this one are to the page numbers reflected on the
 Court's CM/ECF system and not to page numbers assigned by the parties.

1 15.)

2 The day after Officer Walb shot and killed Lopez, Officers Walb, Pickett, and
 3 Scott attended a debriefing with three “peer support officers” and a psychologist. (Dkt.
 4 No. 52-1 at 37).⁴ At this debrief, “each person tells their side of what happened.” (*Id.*)
 5 On the advice of counsel, Officers Walb and Scott refused to answer further deposition
 6 questions concerning this debriefing. (*Id.* at 38-39; Walb Dep. 74:17-76:25, 78:16-
 7 79:14; Scott Dep. 22:6-24:10; Dkt. No. 52-4, Scott Dep. 18:9-13.)

8 III. PROCEDURAL HISTORY

9 Plaintiffs filed this action on September 18, 2013. (Dkt. No. 1.) On March 11,
 10 2014, Plaintiffs filed the operative First Amended Complaint (“FAC”) against
 11 Defendants City of San Diego, Kristopher Michael Walb, Mark Hanten, and William
 12 Lansdowne. (Dkt. No. 18.) The latter two defendants were later dismissed. (Dkt.
 13 Nos. 30, 38.)

14 In the FAC, Plaintiffs allege nine claims: (1) excessive force under 42 U.S.C.
 15 § 1983; (2) wrongful death under § 1983; (3) right of association under § 1983;
 16 (4) failure to properly train under § 1983; (5) failure to properly supervise under
 17 § 1983; (6) wrongful death under California Code of Civil Procedure § 377.60;
 18 (7) battery; (8) negligence; and (9) violation of California Civil Code § 52.1. (Dkt. No.
 19 18.)

20 On October 10, 2014, Defendants filed the instant Motion for Summary
 21 Judgment. (Dkt. No. 48.) On November 14, 2014, Plaintiffs filed their response. (Dkt.
 22 No. 50.) On November 17, 2014, Defendants belatedly filed their separate statement
 23 of undisputed material facts.⁵ (Dkt. No. 51.) On November 28, 2014, Defendants filed
 24

25 ⁴Some of Plaintiffs’ cited portions of the Walb and Scott depositions (i.e., Walb
 26 Dep. 72:19-25; Scott Dep. 17:10-14, 20:21-25) are not included in the record, but the
 parties do not dispute these facts. (Dkt. No. 52-1 at 37-39.)

27 ⁵Plaintiffs contend that Defendants’ Motion for Summary Judgment should be
 28 denied because Defendants failed to include a separate statement of undisputed
 material facts, in violation of the Court’s Chamber Rules. (Dkt. No. 50-1 at 7.) Defendants subsequently filed a late separate statement of undisputed material facts,

1 their reply.⁶ (Dkt. No. 52.)

2 IV. LEGAL STANDARD

3 Federal Rule of Civil Procedure 56 empowers the Court to enter summary
 4 judgment on factually unsupported claims or defenses, and thereby “secure the just,
 5 speedy and inexpensive determination of every action.” *Celotex Corp. v. Catrett*, 477
 6 U.S. 317, 325, 327 (1986). Summary judgment is appropriate if the “pleadings,
 7 depositions, answers to interrogatories, and admissions on file, together with the
 8 affidavits, if any, show that there is no genuine issue as to any material fact and that the
 9 moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). A fact
 10 is material when it affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.*,
 11 477 U.S. 242, 248 (1986).

12 The moving party bears the initial burden of demonstrating the absence of any
 13 genuine issues of material fact. *Celotex Corp.*, 477 U.S. at 323. The moving party can
 14 satisfy this burden by demonstrating that the nonmoving party failed to make a
 15 showing sufficient to establish an element of his or her claim on which that party will
 16 bear the burden of proof at trial. *Id.* at 322-23. If the moving party fails to bear the
 17 initial burden, summary judgment must be denied and the court need not consider the
 18 nonmoving party’s evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60
 19 (1970).

20 Once the moving party has satisfied this burden, the nonmoving party cannot rest
 21 on the mere allegations or denials of his pleading, but must “go beyond the pleadings
 22 and by her own affidavits, or by the ‘depositions, answers to interrogatories, and

23
 24 in which they contend that there is no prejudice to Plaintiffs as to the late filing because
 25 the facts contained in the separate statement mirror the facts in their Motion for
 26 Summary Judgment. (Dkt. No. 51.) While the Court reminds Defendants of the need
 27 to follow Chambers Rules, the Court declines to deny Defendants’ Motion for
 28 Summary Judgment on this ground.

29 ‘Defendants contend that Plaintiffs have waived all of their claims by failing to
 30 adequately address them. (Dkt. No. 52 at 10.) While it would have been helpful for
 31 Plaintiffs to separately address each claim, the Court declines to grant Defendants’
 32 Motion for Summary Judgment on this ground.

1 admissions on file’ designate ‘specific facts showing that there is a genuine issue for
 2 trial.’” *Celotex*, 477 U.S. at 324. If the non-moving party fails to make a sufficient
 3 showing of an element of its case, the moving party is entitled to judgment as a matter
 4 of law. *Id.* at 325. “Where the record taken as a whole could not lead a rational trier
 5 of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’”
 6 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In
 7 making this determination, the court must “view[] the evidence in the light most
 8 favorable to the nonmoving party.” *Fontana v. Haskin*, 262 F.3d 871, 876 (9th Cir.
 9 2001). The Court does not engage in credibility determinations, weighing of evidence,
 10 or drawing of legitimate inferences from the facts; these functions are for the trier of
 11 fact. *Anderson*, 477 U.S. at 255.

12 V. DISCUSSION

13 1. **Excessive Force Under the Fourth Amendment**

14 Plaintiffs assert that Officer Walb’s use of deadly force was excessive under the
 15 Fourth Amendment. (Dkt. No.18 ¶¶ 20-28.) Defendants move for summary judgment
 16 on the ground that Officer Walb is entitled to qualified immunity. (Dkt. No. 48-1 at
 17 15.)

18 Section 1983 provides plaintiffs with a cause of action when a person acting
 19 under the color of state law deprives them of any federal constitutional right. 42 U.S.C.
 20 § 1983. Under the Fourth Amendment, law enforcement may use “objectively
 21 reasonable” force to carry out seizures, and objective reasonableness is determined by
 22 an assessment of the totality of the circumstances. *Graham v. Connor*, 490 U.S. 386,
 23 397 (1989). An officer’s use of deadly force is reasonable only if “the officer has
 24 probable cause to believe that the suspect poses a significant threat of death or serious
 25 physical injury to the officer or others.” *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).
 26 The Ninth Circuit has repeatedly noted that summary judgment in excessive force cases
 27 should be granted “sparingly” because the reasonableness standard “nearly always
 28 requires a jury to sift through disputed factual contentions.” *Torres v. City of Madera*,

1 648 F.3d 1119, 1125 (9th Cir. 2011) (citation and internal quotation marks omitted).

2 In the deadly force context, courts cannot “simply accept what may be a
 3 self-serving account by the police officer.” *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir.
 4 1994). “Because the person most likely to rebut the officers’ version of events – the
 5 one killed – can’t testify, ‘[t]he judge must carefully examine all the evidence in the
 6 record . . . to determine whether the officer’s story is internally consistent and
 7 consistent with other known facts.’” *Cruz v. City of Anaheim*, 765 F.3d 1076, 1079
 8 (9th Cir. 2014) (quoting *Scott*, 39 F.3d at 915). “This includes ‘circumstantial evidence
 9 that, if believed, would tend to discredit the police officer’s story.’” *Id.* (quoting *Scott*,
 10 39 F.3d at 915).

11 “An officer using deadly force is entitled to qualified immunity, unless the law
 12 was clearly established that the use of force violated the Fourth Amendment.”
 13 *Wilkinson v. Torres*, 610 F.3d 546, 550 (9th Cir. 2010). Qualified immunity involves
 14 a two-part inquiry: (1) “whether the facts that a plaintiff has alleged . . . or shown . . .
 15 make out a violation of a constitutional right,” and (2) “whether the right at issue was
 16 ‘clearly established’ at the time of defendant’s alleged misconduct.” *Pearson v.*
 17 *Callahan*, 555 U.S. 223, 232 (2009) (quoting *Saucier v. Katz*, 533 U.S. 194, 201
 18 (2001)).

19 **A. Violation of the Fourth Amendment**

20 Defendants contend that, based on the totality of the circumstances, it was
 21 objectively reasonable for Officer Walb to perceive that Lopez posed an imminent
 22 deadly threat. (Dkt. No. 48-1 at 15-19.) Defendants argue that Officer Walb was
 23 aware that Lopez was a parolee at large and a violent gang member who would be
 24 carrying a weapon in his pocket, that Lopez had fled to avoid arrest, and that Lopez had
 25 refused to follow commands to get down and take his hand out of his pocket with three
 26 machine guns pointed at him. (*Id.* at 17, 19.)

27 Plaintiffs dispute the officers’ account of Lopez’s actions and rely heavily on the
 28 Ninth Circuit’s recent decision in *Cruz*. (Dkt. No. 50-1 at 4-7.) Defendants argue that

1 *Cruz* is distinguishable because here the officers' version of the events is not
2 inconsistent with the known facts. (Dkt. No. 52 at 2.)

3 In *Cruz*, the Ninth Circuit reversed the district court's grant of summary
4 judgment in a deadly force case alleging Fourth and Fourteenth Amendment claims,
5 as well as wrongful death under California law, because there was "circumstantial
6 evidence that could give a reasonable jury pause" regarding whether officers saw Cruz
7 reach for his waistband before they shot and killed him. *Cruz*, 765 F.3d at 1079. The
8 officers had executed a traffic stop on Cruz, a discharged parolee whose prior
9 convictions included a felony involving a firearm, after a confidential informant
10 reported that Cruz was a gang member who sold drugs, that he was carrying a gun in
11 his waistband, and that he had made it clear that he was not going back to prison. *Id.*
12 at 1077-78. After Cruz unsuccessfully tried to escape in his vehicle, the police drew
13 their weapons and shouted at him to get on the ground as he was emerging from his
14 vehicle. *Id.* at 1078. According to four of the five officers, Cruz ignored their
15 commands and instead reached for the waistband of his pants. *Id.* Fearing that he was
16 reaching for a gun, all five officers opened fire, killing Cruz. *Id.* Officers did not find
17 a gun on Cruz, but did recover a loaded gun from the passenger seat. *Id.*

18 The Ninth Circuit explained that for the district court ruling on the officers'
19 motion for summary judgment, the key question was "Could any reasonable jury find
20 it more likely than not that Cruz *didn't* reach for his waistband?" *Id.* at 1079. The
21 Ninth Circuit concluded that, despite the officers' testimony, there was circumstantial
22 evidence that could cause a jury to reasonably conclude that the officers lied. *Id.* at
23 1079-80. The "[m]ost obvious is the fact that Cruz didn't have a gun on him, so why
24 would he have reached for his waistband? . . . [F]or him to make such a gesture when
25 no gun is there makes no sense whatsoever." *Id.* at 1079. The Ninth Circuit also noted
26 that there were other aspects of the officers' story which a jury might find troubling and
27 implausible. *Id.* at 1080. Accordingly, the Ninth Circuit held that the district court
28 erred in granting summary judgment for the officers, and reversed. *Id.*

1 Here, the key question is: Could any reasonable jury find it more likely than not
 2 that Lopez *didn't* comply with the officers' orders to remove his hand from his pocket
 3 and get down? As in *Cruz*, no gun was found on Lopez, which Plaintiffs argue could
 4 give a reasonable jury pause as to whether Lopez did in fact keep his hand in pocket,
 5 despite facing three armed SRT officers who were pointing machine guns at him and
 6 commanding him to get down and take his hands out of his pockets. (Dkt. No. 50-1 at
 7 24-25.) Like in *Cruz*, “for him to make such a gesture when *no* gun is there makes no
 8 sense whatsoever.” *Cruz*, 765 F.3d at 1079. Defendants contend that *Cruz* is
 9 distinguishable because the evidence supports two possible explanations for Lopez’s
 10 seemingly irrational movements: (1) the drugs found in Lopez’s system, which may
 11 have caused him to behave erratically; and/or (2) the apparent drugs found on Lopez’s
 12 body, which he may have been attempting to discard. (Dkt. No. 52 at 3-4.) However,
 13 while a reasonable jury could believe that Lopez kept his hand in his pocket for
 14 Defendants’ proffered reasons, or some other reason altogether, “the jury could also
 15 reasonably conclude that the officers lied.” *Cruz*, 765 F.3d at 1080.

16 Further, Plaintiffs have submitted other circumstantial evidence that could cause
 17 a reasonable jury to question whether the officers saw Lopez with his left hand in his
 18 pocket at the time Officer Walb shot him. For example, Officers Walb and Scott
 19 testified that Lopez’s right side was facing them at the time Lopez was shot, which
 20 could raise doubts whether they could see Lopez’s left hand due to his body
 21 orientation. (Walb Dep. 10:10-11:1; Scott Dep. 35:12-24.) Also, the officer who
 22 moved Lopez’s body reported that Lopez’s left hand was concealed underneath his
 23 chest area on the left side. (Dkt. No. 50-19 at 3). Moreover, the day after the shooting
 24 Officers Walb, Pickett, and Scott had a debriefing, about which they refused to answer
 25 deposition questions and which might cause a jury to distrust the officers’ accounts.
 26 (Dkt. No. 52-1 at 37-39.)

27 In addition, Plaintiffs have submitted circumstantial evidence that could cause
 28 a reasonable jury to question the officers’ testimony that Lopez was not complying with

1 their orders to get down. Plaintiffs' ballistics expert concluded that Lopez was moving
2 downward when he was struck by the bullets, and that Lopez could not have been
3 standing or turning to the right at that time, as testified by the officers. (Dkt. No. 50-1
4 at 20-23.) Plaintiffs contend that this supports that Lopez was complying with the
5 officers' orders to get down when Officer Walb shot him. (*Id.* at 25.) Defendants
6 counter that the officers' account is not inconsistent with Plaintiffs' ballistics expert.
7 (Dkt. No. 52 at 4-7.) Defendants agree that Lopez was in a forward descending motion,
8 and was not standing, when the bullets struck him, but contend that this was due to the
9 first burst of three bullets missing Lopez, and then Lopez crouching and turning back
10 to his left in response before he was hit by the second burst of three bullets. (*Id.*) In
11 other words, Defendants argue that Lopez could have been standing when Officer Walb
12 began to shoot at him, even though Lopez was not standing when the bullets actually
13 hit him. (*Id.*) It is possible that the jury could believe that the ballistics evidence is
14 consistent with the officers' account. However, it is also possible for the jury to
15 reasonably conclude that it is consistent with Plaintiffs' version that Lopez was
16 complying with the officers' orders to get down.

17 At this stage of the proceedings, the Court does not weigh the evidence or make
18 determinations about credibility. *Anderson*, 477 U.S. at 255; *Cruz*, 765 F.3d at 1080.
19 Viewing the evidence in the light most favorable to Plaintiffs, a reasonable jury could
20 disbelieve the officers' version of events. *See Cruz*, 765 F.3d at 1080; *Ortega v. San*
21 *Diego Police Dep't*, No. 12cv87-LAB (JMA), 2014 WL 6388488, at *5-6 (S.D. Cal.
22 Nov. 14, 2014) (denying summary judgment on Fourth Amendment claim in deadly
23 force case because reasonable jury could disbelieve officer's version of events that
24 decedent had reached for the officer's weapon). Therefore, the Court concludes that
25 there is a genuine dispute of material fact as to whether Officer Walb violated the
26 Fourth Amendment.

27 **B. "Clearly Established Right"**

28 Defendants contend that even if Officer Walb violated the Fourth Amendment,

1 he is still entitled to qualified immunity because the alleged right was not clearly
 2 established. (Dkt. No. 48-1 at 20-22.)

3 Case law makes clear that an officer may not use deadly force to apprehend a
 4 suspect where the suspect poses no immediate threat to the officer or others. *Garner*,
 5 471 U.S. at 11; *see also Cruz*, 765 F.3d at 1078-79 (“[I]f the suspect *doesn’t* reach for
 6 his waistband or make some similar threatening gesture, it would clearly be
 7 unreasonable for the officers to shoot him after he stopped his vehicle and opened the
 8 door.”). On the other hand, it is not constitutionally unreasonable to use deadly force
 9 “[w]here the officer has probable cause to believe that the suspect poses a threat of
 10 serious physical harm, either to the officer or to others.” *Garner*, 471 U.S. at 11; *see*
 11 *also Estate of Moppin-Buckskin v. City of Oakland*, No. 08cv4328 CW, 2010 WL
 12 147976, at *6 (N.D. Cal. Jan. 12, 2010) (holding that deadly force was justified, even
 13 though it turned out that suspect did not have a weapon, where the suspect acted
 14 belligerently, was reluctant to comply with commands, reached towards his waistband,
 15 and stated that he did not care if the officers shot him because he had been shot before).

16 Defendants repeat their arguments that the totality of the circumstances would
 17 lead an objectively reasonable officer to believe that Officer Walb faced a life
 18 threatening situation. (Dkt. No. 48-1 at 21.) However, if a jury were to find that
 19 Lopez was getting down and did not keep his hand in his pocket or make some similar
 20 threatening gesture, and that Officer Walb violated his Fourth Amendment rights by
 21 shooting him while he posed no significant threat, the violation would be clearly
 22 established under the law set forth in *Garner* governing the use of deadly force to effect
 23 a seizure of a suspect. Therefore, the Court concludes that summary judgment on
 24 qualified immunity against Plaintiffs’ Fourth Amendment claim is not warranted.

25 Accordingly, Defendants’ Motion for Summary Judgment is **DENIED** with
 26 respect to Plaintiffs’ first claim for excessive force under the Fourth Amendment.

27 **2. Wrongful Death Under Section 1983**

28 In their second claim, labeled “Wrongful Death – 42 U.S.C. § 1983,” Plaintiffs

1 allege that Officer Walb's use of deadly force "deprived Angel Lopez of his rights
 2 under the United States Constitution to be free from the use of excessive force by law
 3 enforcement and punishment without due process." (Dkt. No. 18 ¶ 31.) Plaintiffs do
 4 not specify under which constitutional provision this claim arises.

5 Defendants contend that Plaintiffs' second claim should be dismissed based on
 6 the same "facts, arguments and reasoning" regarding Plaintiffs' first claim for
 7 excessive force under the Fourth Amendment. (Dkt. No. 48-1 at 22.) Because the
 8 Court concluded that summary judgment was not warranted on Plaintiffs' first claim,
 9 Defendants have failed to show that summary judgment is warranted on Plaintiffs'
 10 second claim.

11 Accordingly, Defendants' Motion for Summary Judgment is **DENIED** with
 12 respect to Plaintiffs' second claim for wrongful death under section 1983.

13 **3. Right of Association Under the Fourteenth Amendment**

14 Plaintiffs assert that Officer Walb's use of deadly force unconstitutionally
 15 interfered with their rights to familial relationships with their husband and father in
 16 violation of the Fourteenth Amendment. (Dkt. No. 18 ¶¶ 34-38.) Defendants contend
 17 that Officer Walb's conduct did not violate the Fourteenth Amendment. (Dkt. No. 48-1
 18 at 22-24.)

19 Spouses and children may assert Fourteenth Amendment substantive due process
 20 claims if they are deprived of their liberty interest in the companionship and society of
 21 their spouse or parent through official conduct. *See Lemire v. Cal. Dep't of Corr. &*
22 Rehab., 726 F.3d 1062, 1075 (9th Cir. 2013) (children); *Morales v. City of Delano*, 852
 23 F. Supp. 2d 1253, 1273-74 (E.D. Cal. 2012) (spouse and children).

24 The Fourteenth Amendment's Due Process Clause creates a right to be free from
 25 "executive abuse of power . . . which shocks the conscience." *County of Sacramento*
26 v. Lewis, 523 U.S. 833, 846 (1998). "In determining whether excessive force shocks
 27 the conscience, the court must first ask whether the circumstances are such that actual
 28 deliberation by the officer is practical." *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th

1 Cir. 2010) (internal quotations and alterations omitted). If the officer in question was
 2 faced with a time frame where actual deliberation was practical, a plaintiff may
 3 establish a Fourteenth Amendment violation by showing that the officer “acted with
 4 deliberate indifference.” *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008).
 5 Otherwise, if the officer “faced an evolving set of circumstances that took place over
 6 a short time period necessitating ‘fast action,’” a plaintiff must make a higher showing
 7 that the officer “acted with a purpose to harm” the plaintiff. *Id.* at 1139 (quoting *Lewis*,
 8 523 U.S. at 853). “[T]he overarching test under either is whether the officer’s conduct
 9 ‘shocks the conscience.’” *Id.*

10 Defendants contend that the more stringent purpose to harm standard applies
 11 here. (Dkt. No. 48-1 at 23-24.) Plaintiffs do not address this issue. (Dkt. No. 50-1.)

12 The Court determines that the purpose to harm standard applies here because
 13 Officer Walb faced a fast paced, evolving situation with insufficient time for
 14 deliberation. Under the purpose to harm standard, a plaintiff must show that an
 15 officer’s purpose was “to cause harm unrelated to the legitimate object of arrest.”
 16 *Porter*, 546 F.3d at 1140 (citation and internal quotation marks omitted). It is precisely
 17 “the intent to inflict force beyond that which is required by a legitimate law
 18 enforcement objective that ‘shocks the conscience’ and gives rise to liability under
 19 § 1983. . . .” *Id.* (citation and internal quotation marks omitted).

20 Plaintiffs have produced no evidence that Officer Walb had any ulterior motive
 21 for firing his weapon at Lopez. *See Gonzalez v. City of Anaheim*, 747 F.3d 789, 797-
 22 98 (9th Cir. 2014) (en banc) (affirming summary judgment on Fourteenth Amendment
 23 substantive due process claim arising from deadly force, even though genuine dispute
 24 regarding Fourth Amendment excessive force claim, because plaintiffs produced no
 25 evidence that the officers had any ulterior motives for using force); *Hayes v. County*
 26 *of San Diego*, 736 F.3d 1223, 1230-31 (9th Cir. 2013) (affirming summary judgment
 27 on Fourteenth Amendment substantive due process claim in deadly force case because
 28 there was no evidence that the deputies fired their weapons for any purpose other than

1 self-defense). Therefore, Plaintiffs failed to raise a genuine issue of material fact
 2 regarding their substantive due process claim.

3 Accordingly, Defendants' Motion for Summary Judgment is **GRANTED** with
 4 respect to Plaintiffs' third claim for right of association under the Fourteenth
 5 Amendment.

6 **4. Failure to Properly Train Under Section 1983**

7 Plaintiffs concede that summary judgment is appropriate on their fourth claim
 8 for failure to properly train, and do not object to the dismissal of this claim. (Dkt. No.
 9 50-1 at 28.) Accordingly, Defendants' Motion for Summary Judgment is **GRANTED**
 10 with respect to Plaintiffs' fourth claim for failure to properly train.

11 **5. Failure to Properly Supervise Under Section 1983**

12 Plaintiffs also concede that summary judgment is appropriate on their fifth claim
 13 for failure to properly supervise, and do not object to the dismissal of this claim. (Dkt.
 14 No. 50-1 at 28.) Accordingly, Defendants' Motion for Summary Judgment is
 15 **GRANTED** with respect to Plaintiffs' fifth claim for failure to properly supervise.

16 **6. Wrongful Death Under California Code of Civil Procedure § 377.60**

17 Defendants move for summary judgment on Plaintiffs' state law wrongful death
 18 claim on the grounds that California Government Code § 820.2 immunizes public
 19 officers like Officer from suit for all discretionary acts other than excessive or
 20 unreasonable use of force. (Dkt. No. 48-1 at 27-28.) Under section 820.2, "a public
 21 employee is not liable for an injury resulting from his act or omission where the act or
 22 omission was the result of the exercise of the discretion vested in him, whether or not
 23 such discretion be abused." Cal. Gov't Code § 820.2. "But 'a police officer does not
 24 have discretionary immunity from liability for the use of unreasonable force in making
 25 an arrest.'" *Ortega*, 2014 WL 6388488, at *12 (quoting *Scruggs v. Haynes*, 252 Cal.
 26 App. 2d 256, 267 (1967)).

27 Defendants contend that Officer Walb is immune from suit unless he used
 28 excessive force. (Dkt. No. 48-1 at 28.) However, the Court already determined that

1 there was a genuine dispute of material fact regarding whether Officer Walb's use of
 2 deadly force was excessive.

3 Accordingly, Defendants' Motion for Summary Judgment is **DENIED** with
 4 respect to Plaintiffs' sixth claim for wrongful death under California Civil Procedure
 5 § 377.60.

6 **7. Battery**

7 Defendants also move for summary judgment on Plaintiffs' battery claim. (Dkt.
 8 No. 48-1 at 28-29.) Under California law, a plaintiff bringing a battery claim against
 9 a law enforcement official has the burden of proving the officer used unreasonable
 10 force. *See Saman v. Robbins*, 173 F.3d 1150, 1157 n.6 (9th Cir. 1999) ("A prima facie
 11 case for battery is not established under California law unless the plaintiff proves that
 12 an officer used unreasonable force against him to make a lawful arrest or detention.").

13 "Because the Court has already determined that Plaintiffs' excessive force claim
 14 survives summary judgment, their . . . battery claim is also viable." *Ortega*, 2014 WL
 15 6388488, at * 12; *see also Nelson v. City of Davis*, 709 F. Supp. 2d 978, 992 (E.D. Cal.
 16 2010), *aff'd*, 685 F.3d 867 (9th Cir. 2012) ("Because the same standards apply to both
 17 state law assault and battery and Section 1983 claims premised on constitutionally
 18 prohibited excessive force, the fact that Plaintiff's § 1983 claims under the Fourth
 19 Amendment survive summary judgment also mandates that the assault and battery
 20 claims similarly survive.") A genuine dispute of material fact remains as to whether
 21 Officer Walb used unreasonable force.

22 Accordingly, Defendants' Motion for Summary Judgment is **DENIED** with
 23 respect to Plaintiffs' seventh claim for battery.

24 **8. Negligence**

25 Plaintiffs allege that Officer Walb was negligent in his use of deadly force. (Dkt.
 26 No. 18 ¶¶ 76-78.) "[I]n order to prove facts sufficient to support a finding of
 27 negligence, a plaintiff must show that [the] defendant had a duty to use due care, that
 28 he breached that duty, and that the breach was the proximate or legal cause of the

1 resulting injury.” *Hayes v. County of San Diego*, 305 P.3d 252, 255 (Cal. 2013).
 2 “[P]eace officers have a duty to act reasonably when using deadly force.” *Id.* at 256.
 3 “The reasonableness of an officer’s conduct is determined in light of the totality of
 4 circumstances.” *Id.*

5 Defendants contend that Plaintiffs’ claim that the shooting was negligent fails
 6 because Officer Walb’s actions were reasonable. (Dkt. No. 48-1 at 29-30.) However,
 7 the Court already determined that there is a genuine dispute whether Officer Walb’s
 8 actions were reasonable.

9 Defendants also contend that Plaintiffs’ negligence claim fails because it rests
 10 on the same facts as their section 1983 claims. (Dkt. No. 48-1 at 29-30.) They cite
 11 *Whitefeld v. Tri-Metropolitan Transp. Dist.*, No. 06-cv-1655-HA, 2009 WL 839484,
 12 at *11 (D. Or. Mar. 30, 2009) for the proposition that “a state common-law claim of
 13 negligence may be maintained separately from a § 1983 claim only when the
 14 negligence claim is based on facts that are different from the facts on which the § 1983
 15 claims are based.” However, Defendants rely only on an Oregon district court case,
 16 which focuses on the “law of th[at] District.” *Id.*

17 Accordingly, Defendants’ Motion for Summary Judgment is **DENIED** with
 18 respect to Plaintiffs’ eighth claim for negligence premised on Officer Walb shooting
 19 Lopez.

20 However, Plaintiffs also allege that the City of San Diego was negligent in its
 21 training and supervision. (Dkt. No. 18 ¶¶ 80-83.) Because Plaintiffs’ concede that
 22 summary judgment is appropriate on their separate failure to properly train and failure
 23 to properly supervise claims (Dkt. No. 50-1 at 28), the Court also **GRANTS**
 24 Defendants’ Motion for Summary Judgment on Plaintiffs’ negligence claim premised
 25 on training and supervision.

26 **9. Violation of California Civil Code § 52.1 (Bane Act)**

27 Finally, Defendants move for summary judgment on Plaintiffs’ claim for
 28 violation of California Civil Code § 52.1, also known as the Bane Act. (Dkt. No. 48-1

1 at 30-31.) The Bane Act provides a private cause of action against anyone who
 2 “interferes by threats, intimidation, or coercion, or attempts to interfere by threats,
 3 intimidation, or coercion, with the exercise or enjoyment by an individual or
 4 individuals of rights secured by the Constitution or laws of the United States, or laws
 5 and rights secured by the Constitution or laws of California.” Cal. Civil Code
 6 § 52.1(a). The Bane Act requires “an attempted or completed act of interference with
 7 a legal right, accompanied by a form of coercion.” *Jones v. Kmart Corp.*, 949 P.2d
 8 941, 944 (1998). Although the Bane Act was initially considered to apply only to hate
 9 crimes, the California Supreme Court subsequently broadened its application and held
 10 that “plaintiffs need not allege that defendants acted with discriminatory animus or
 11 intent, so long as those acts were accompanied by the requisite threats, intimidation,
 12 or coercion.” *Venegas v. County of Los Angeles*, 87 P.3d 1, 14 (Cal. 2004) (allowing
 13 Bane Act claim for unlawful seizure). “[T]he elements of the excessive force claim
 14 under § 52.1 are the same as under § 1983.” *Cameron v. Craig*, 713 F.3d 1012, 1022
 15 (9th Cir. 2013).

16 Defendants contend that a ruling in favor of Defendants on the section 1983
 17 excessive force claim precludes Plaintiffs’ Bane Act claim. (Dkt. No. 48-1 at 30-31.)
 18 However, this argument is unavailing because the Court already denied summary
 19 judgment on the section 1983 excessive force claim.

20 Defendants also argue, relying on the California Appeals Court’s decision in
 21 *Shoyoye v. County of Los Angeles*, that to sustain a Bane Act claim “[t]he act of
 22 interference with a constitutional right must itself be deliberate or spiteful,” and
 23 “[t]he statute requires a showing of coercion independent from the coercion inherent
 24 in the wrongful detention itself.” (Dkt. No. 48-1 at 31 (quoting *Shoyoye v. County of*
 25 *Los Angeles*, 203 Cal. App. 4th 947, 959 (Ct. App. 2012).)⁷ In *Shoyoye*, a clerical error
 26 resulted in the unlawful detention of a prisoner that had been ordered released, and the

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 28 ⁷In their opposition, Plaintiffs do not offer legal argument regarding their Bane
 Act claim, other than listing it among the claims that are “amply supported by the
 evidence and should remain for trial.” (Dkt. No. 50-1 at 28.)

1 California Appeals Court rejected the prisoner's Bane Act claim because "[t]he
 2 apparent purpose of the statute is not to provide relief for an overdetention brought
 3 about by human error" but rather by "intentional conduct." *Shoyoye*, 203 Cal. App. 4th
 4 at 959.

5 However, after *Shoyoye* was decided, the same California Court of Appeal
 6 decided *Bender v. County of Los Angeles*, which held that the Bane Act applied to an
 7 excessive force claim which involved an unlawful arrest, but explicitly left open the
 8 issue of whether the Bane Act would apply in cases involving the alleged use of force
 9 during an otherwise lawful arrest based on probable cause. *Bender v. County of Los*
 10 *Angeles*, 217 Cal. App. 4th 968, 978 (Ct. App. 2013). In *Bender*, the court
 11 distinguished *Shoyoye*, and determined that "the Bane Act applie[d] because there was
 12 a Fourth Amendment violation – an arrest without probable cause – accompanied by
 13 the beating and pepper spraying of an unresisting plaintiff, i.e., coercion that is in no
 14 way inherent in an arrest, either lawful or unlawful." *Id.* The court noted "not every
 15 wrongful detention" and not "every case of excessive force in the effectuation of an
 16 otherwise lawful arrest is a violation of the Bane Act." *Id.* at 981. Rather, the court
 17 held that "a wrongful detention that is 'accompanied by the requisite threats,
 18 intimidation, or coercion' (quoting *Venegas*, 87 P.3d at 14) – 'coercion independent
 19 from the coercion inherent in the wrongful detention itself' that is 'deliberate or
 20 spiteful' (quoting *Shoyoye*, 203 Cal. App. 4th at 959) – is a violation of the Bane Act."
 21 *Id.*

22 The federal district courts are split regarding whether *Shoyoye* applies to all Bane
 23 Act claims, and whether a plaintiff bringing a Bane Act claim must introduce
 24 independent evidence showing threats, intimidation, or coercion, in addition to
 25 showing a constitutional violation. *See Gregory v. City of Vallejo*, No. 12-cv-320-
 26 KJM-KJN, 2014 WL 5473075, at *8 (E.D. Cal. Oct. 28, 2014). Some courts,
 27 interpreting *Shoyoye* narrowly, have held that the essence of *Shoyoye* is that the Bane
 28 Act "was not intended to redress harms 'brought about by human error rather than

1 intentional conduct.”” *Bass v. City of Fremont*, No. 12-cv-4943 THE, 2013 WL
 2 891090, at *5 (N.D. Cal. Mar. 8, 2013) (quoting *Shoyoye*, 203 Cal. App. 4th at 959);
 3 *see also D.V. v. City of Sunnyvale*, No. 14-cv-2155-RMW, 2014 WL 4072338, at *4-5
 4 (N.D. Cal. Aug. 14, 2014) (noting that “the great weight of authority in the Northern
 5 District of California has . . . confined *Shoyoye* to circumstances involving negligent
 6 conduct”). Based on this reasoning, courts have applied the Bane Act to a claim of
 7 unlawful arrest or excessive force alone. *See, e.g., Hampton v. City of Oakland*, No.
 8 13-cv-3094 DMR, 2014 WL 5600879, at *18 (N.D. Cal. Nov. 3, 2014) (denying
 9 summary judgment on Bane Act claim premised on unlawful arrest and concluding that
 10 a Bane Act claim “does not require threats, coercion, or intimidation independent from
 11 the threats, coercion, or intimidation inherent in the alleged constitutional or statutory
 12 violation” (citation and internal quotation marks omitted)); *Rodriguez v. City of*
 13 *Modesto*, No. 10-cv-01370-LJO, 2013 WL 6415620, at *10-13 (E.D. Cal. Dec. 9, 2013)
 14 (denying motion to dismiss because “[a] plaintiff bringing a Bane Act excessive force
 15 need not allege a showing of coercion independent from the coercion inherent in the
 16 use of force”).

17 Other courts have held that something more than an inherently coercive violation
 18 is required for a claim under the Bane Act, and have rejected Bane Act claims based
 19 on excessive force during or after arrests that were otherwise lawful, where plaintiffs
 20 made no showing of coercion separate from their underlying excessive force claim.
 21 *See, e.g., Ortega*, 2014 WL 6388488, at *11 (granting summary judgment on Bane Act
 22 claim, even though genuine dispute whether deadly force was excessive, because
 23 plaintiffs made no showing of coercion separate and apart from their underlying Fourth
 24 and Fourteenth Amendment claims); *Luong v. City & County of San Francisco*, No. 11-
 25 cv-5661 MEJ, 2012 WL 5869561, at *8 (N.D. Cal. Nov. 19, 2012) (granting summary
 26 judgment on Bane Act claim, even though genuine dispute whether force involving
 27 officers stepping on one arrestee and throwing another arrestee against the wall was
 28 excessive, because plaintiffs made no showing of independent coercion outside of their

1 underlying constitutional claims).

2 In the absence of binding authority, the Court finds persuasive the line of cases
3 permitting Bane Act claims based on the same conduct as an underlying constitutional
4 violation. *Shoyoye* is distinguishable on its facts. There, the plaintiff was lawfully
5 arrested but detained for much longer than permitted by law because of a negligent
6 clerical error. *Shoyoye*, 203 Cal. App. 4th at 951-53. In contrast, here there is a
7 genuine dispute whether the deadly force was deliberate and “intended to interfere
8 with the exercise or enjoyment of a constitutional right.” *Id.* at 957-58.

9 Accordingly, Defendants’ Motion for Summary Judgment is **DENIED** with
10 respect to Plaintiffs’ ninth claim for violation of California Civil Code § 52.1 (Bane
11 Act).

12 VI. CONCLUSION AND ORDER

13 For the foregoing reasons, **IT IS HEREBY ORDERED:**

- 14 (1) the Court **GRANTS IN PART AND DENIES IN PART** Defendants’
15 Motion for Summary Judgment (Dkt. No. 48.)
- 16 (2) the Court **GRANTS** summary judgment as to Plaintiffs’ third claim for
17 right of association under the Fourteenth Amendment, fourth claim for
18 failure to properly train, fifth claim for failure to properly supervise, and
19 eighth claim for negligence premised on training and supervision
- 20 (3) the Court **DENIES** summary judgment as to Plaintiffs’ first claim for
21 excessive force under the Fourth Amendment, second claim for wrongful
22 death under section 1983, sixth claim for wrongful death under California
23 Civil Procedure § 377.60, seventh claim for battery, eighth claim for
24 negligence premised on Officer Walb shooting Lopez, and ninth claim for
25 violation of California Civil Code § 52.1 (Bane Act)

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2 DATED: December 18, 2014
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HON. GONZALO P. CURIEL
United States District Judge